87-608

Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

Helmer T. Pederson,
Appellant/Judgment Debtor,

v.

Sylvan Shulman,
Appellee/Judgment Creditor.

On Appeal from the United States Court of Appeals
For the Ninth District

MOTION OF APPELLEE TO DISMISS THE APPEAL OR AFFIRM THE LOWER COURT JUDGMENT

STYN & GARLAND
Jeffrey N. Garland
Tawn H. Skousen
111 Elm Street, Suite 333
San Diego, CA 92101
(619) 544-1144

ATTORNEYS FOR APPELLEE

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

QUESTION PRESENTED

The sole issue before this court is whether the United States Supreme Court has jurisdiction to adjudicate an appeal from the judgment of a Federal Court of Appeals which was based strictly upon the resolution of questions of fact inasmuch as:

(1) No federal or constitutional issues were raised;

(2) No state or federal statutes were declared invalid; and

(3) No issues of public interest were involved.

In fact, the only determination made by the lower courts was that appellee presented sufficient factual evidence to establish that the subject real property was the community property of appellant, thereby overcoming rebuttable presumptions to the contrary.

PARTIES TO THE PROCEEDINGS

The original parties before the United States District Court, Central District of California, were Spacetime Systems Corporation, Edmond J. E'Chavarrie, Allen H. K. Chun, Harry Stromer, and Helmer T. Pederson, the named defendants, and Sylvan Shulman, the plaintiff.

Only Helmer T. Pederson and Sylvan Shulman were involved in the proceedings before the United States Court of Appeals for the Ninth Circuit, which involved an appeal by Helmer T. Pederson of an order of the Southern District of California enforcing the judgment of the Central District of California.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	6
I APPELLANT'S MOTION TO DISMISS OR AFFIRM IS TIMELY AND PROPERLY RAISED	6
II THE APPEAL IS WITHOUT PROPER JURISDICTIONAL BASIS	8
III THE FEDERAL ISSUES ARE NOT SUBSTANTIAL AND WERE NOT RAISED IN THE LOWER COURT PROCEEDINGS	10
IV THE FINDINGS OF THE LOWER COURT WERE NOT CLEARLY ERRONEOUS AND, THEREFORE, MUST BE AFFIRMED	12
A. Due Deference Should Be Given To the Lower Court Judgment	12
B. The Lower Court Judgment Was Factually and Legally Correct	15
CONCLUSION	21

TABLE OF AUTHORITIES

Cases	Page
Adickes v. S. H. Kress & Co. (1970) 398 U.S. 144, 147 n.2 . . .	12
Anderson v. Bessemer City (1985) 470 U.S. 564, 573-574 . . .	13
Beck v. Beck (1960) 242 Cal.App.2d 396	15
Blau v. Lehman (1962) 368 U.S. 403, 408-409	14
Boulder v. Holman (1969) 394 U.S. 478, 480-481	14
Gudelj v. Gudelj (1953) 41 Cal.2d 202, 212	19
Hansford v. Lassar (1975) 53 Cal.App.3d 364	19,20,27
Jafeman, In re Marriage of (1972) 29 Cal.App.3d 244	15
Socol v. King (1950) 36 Cal.2d 342	19
United States v. Durham Lumber Co. (1960) 363 U.S. 522, 526-527 .	14
United States v. National Asso. of Real Estate Boards (1950) 339 U.S. 485, 495-496	14

Cases	Page
United States v. Yellow Cab Co. (1949) 338 U.S. 338, 342	14
Statutes	
California Civil Code § 4800.1 . .	18
California Civil Code § 5120.110	21
California Code of Civil Procedure § 695.020	20
28 U.S.C. § 1254	2,8,9,10
28 U.S.C. § 1257	2,9
28 U.S.C. § 1257(2)	8
Miscellaneous	
Federal Rules of Civil Procedure, Rule 52	13
Supreme Court Rule 15, Revised	11
Supreme Court Rule 15.1(g), Revised	7
Supreme Court Rule 16.1, Revised	1,6

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

Helmer T. Pederson, Appellant,
v.
Sylvan Shulman, Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the appellee Sylvan Shulman moves to dismiss the appeal filed on behalf of Helmer T. Pederson, or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Ninth Circuit. The motion is grounded on the fact that the appellant has no standing to invoke this court's appellate jurisdiction.

STATUTORY PROVISIONS INVOLVED

In pertinent part, 28 U.S.C. § 1257 provides:

> [F]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. § 1254 states, in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> . . . .
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of

such appellant, and the review on appeal shall be restricted to the Federal questions presented.

STATEMENT OF THE CASE

On November 19, 1984, judgment in the principal amount of $700,000, plus accrued interest and costs, was entered in the United States District Court for the Central District of California, in Case No. CV 81-6466-RMT(Mx), entitled Sylvan Shulman v. Spacetime Systems Corporation, etc., et al., in favor of the appellee and against appellant Helmer T. Pederson, the judgment debtor, and certain of the other named defendants.

On November 4, 1985, the Honorable Gordon Thompson, Jr., Judge of the United States District Court, Southern District of California, issued an Order For Sale of Dwelling commonly known as 241 North Pacific Avenue, Solana Beach, California ("the property"), as a means of partially

satisfying the outstanding judgment. Appellant Helmer T. Pederson was joint owner of the property with his wife, Marjorie M. Pederson. The trial court found that the dwelling house was community property and subject to execution to satisfy the judgment against the appellant. The full text of the Order, which is attached to appellant's jurisdictional statement as Appendix "A," is incorporated by reference.

Appellant's request for a stay of the Order authorizing the sale of the dwelling was denied by the trial court. No other requests for stay were made or granted, and appellee purchased the property at the execution sale. At the sale, appellee made a cash payment of $70,670.32 (representing appellant's homestead exemption, the current liens on the property and the Marshal's fees)

combined with a credit bid of $246,129.68.

Appellant appealed the Order for Sale of Dwelling to the United States Court of Appeals for the Ninth Circuit. After hearing oral argument, the appellate court affirmed the lower court judgment. Final judgment was entered on April 9, 1987. A copy of the judgment is attached to appellant's jurisdictional statement as Appendix "B" and is hereby incorporated by reference. Appellant's petition for rehearing was denied on May 7, 1987.

Notice of appeal by the judgment debtor to the United States Supreme Court was filed on May 22, 1987. The original jurisdictional statement was mailed on August 5, 1987, ninety days after the denial of the rehearing; however, it has been repeatedly rejected by the court due

to appellant's failure to comply with certain technical requirements. To date, the appeal has not been formally docketed. The motion is premised upon the lack of jurisdiction of this honorable court to entertain and resolve the issues raised on appeal.

ARGUMENT

I

APPELLANT'S MOTION TO DISMISS OR AFFIRM IS TIMELY AND PROPERLY RAISED

Rule 16.1 of the Revised Rules of the Supreme Court of the United States authorizes an appellee to file a motion to dismiss the appeal or, in the alternative, affirm the lower court judgment within thirty days of receipt of the jurisdictional statement grounded upon jurisdictional or procedural defects, lack of a substantial federal

question, or any other pertinent grounds.

The within motion will be filed by the court clerk as soon as the case is officially docketed. Thus, the motion must clearly be considered as timely filed. Furthermore, the motion is properly grounded.

The appeal is not within the jurisdiction of the Supreme Court, and was not taken in conformity with the federal statutes and Rule 15.1, subparagraph g, as more fully discussed infra. Further, the asserted federal issues are not substantial, and were not raised or expressly passed on in the lower court proceedings. No state or federal statutes were declared invalid, and no issues of public interest were involved. In addition, no further argument is needed on the issues that were adjudicated; the underlying dispute

involves issues of fact, the resolution of which was well supported by fact and law. As such, the appeal should be dismissed, and the lower court judgment affirmed.

II

THE APPEAL IS WITHOUT PROPER JURISDICTIONAL BASIS

It is uncertain upon which jurisdictional provision appellant intends to rely. The notice of appeal stated that the appeal was purportedly taken pursuant to 28 U.S.C. § 1257(2). However, the jurisdictional statement ostensibly invoked jurisdiction pursuant to 28 U.S.C. § 1254. Regardless, neither of the above provisions endow the Supreme Court with jurisdiction to adjudicate the appeal with which it is presently faced.

28 U.S.C. § 1257, subparagraph 2, pertains to appeals from the judgment of

a State court where the validity of a state statute has been upheld despite contentions that the statute is repugnant to the Constitution, treaties or laws of the United States. In the case at bar, the judgment debtor appeals from the judgment of the United States Court of Appeals for the Ninth Circuit, a federal court. Thus, § 1257, which relates to state courts, has no application.

28 U.S.C. § 1254 refers to appeals by a party relying on a State statute which is held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. The review on appeal is restricted to the federal questions presented. No state statute was invalidated in the case at hand. In the underlying proceedings, the lower court simply weighed the evidence presented with respect to the questions

of fact and interpreted the relevant statutory provisions, the validity of which were implicitly upheld. Therefore, § 1254 provides no jurisdictional basis for the within appeal.

III

THE FEDERAL ISSUES ARE NOT SUBSTANTIAL AND WERE NOT RAISED IN THE LOWER COURT PROCEEDINGS

As will be discussed more fully in the following section, the alleged federal questions are not substantial. No state or federal statute was declared invalid. The contested order, to which two federal courts concurred, simply involved a question of fact as to whether a presumption had been overcome in the unique circumstances of the case at bar. No issues of public interest were involved.

Further, the appellant failed to raise any of the presently asserted federal issues in any of the lower court proceedings. The alleged federal questions were raised, for the first time, on appeal to the United States Supreme Court.

Rule 15, Revised Rules of the Supreme Court of the United States, states that the jurisdictional statement must contain:

> (g) A concise statement of the case containing the facts material to consideration of the questions presented. The statement of the case shall also specify the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court. (Emphasis in the original.)

Appellant omitted reference to the prior litigation of the federal issues,

because no such litigation or adjudication occurred. They were neither raised nor decided in the lower court proceedings and, therefore, should not be considered on appeal. See, e.g., Adickes v. S. H. Kress & Co. (1970) 398 U.S. 144, 147 n.2.

The appeal is substantively and procedurally defective. It was not, and cannot, be taken in conformity with the relevant jurisdictional statutes and court rules. As such, the lower court judgment should be affirmed or the appeal dismissed.

IV

THE FINDINGS OF THE LOWER COURT WERE NOT CLEARLY ERRONEOUS AND, THEREFORE, MUST BE AFFIRMED

A. Due Deference Should Be Given to the Lower Court Judgment.

Rule 52 of the Federal Rules of Civil Procedure states, in relevant part: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Therefore, if the District Court's account of evidence is plausible in light of the record viewed in its entirety, the reviewing court may not reverse it, even though it may be convinced that had it been sitting as trier of fact it would have weighed the evidence differently. The above proposition is true even when the findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. Anderson v. Bessemer City (1985) 470 U.S. 564, 573-

574. See, also, United States v. National Asso. of Real Estate Boards (1950) 339 U.S. 485, 495-496, and United States v. Yellow Cab Co. (1949) 338 U.S. 338, 342.

Thus, the Supreme Court should not exert its jurisdiction to review findings of fact concurred in by two lower federal courts, unless the findings of fact are clearly erroneous. Cf., Blau v. Lehman (1962) 368 U.S. 403, 408-409 and Boulder v. Holman (1969) 394 U.S. 478, 480-481. Likewise, in dealing with issues of state law, the Supreme Court should be hesitant to overrule decisions by federal courts skilled in the law of a particular state, unless their conclusions are shown to be unreasonable. United States v. Durham Lumber Co. (1960) 363 U.S. 522, 526-527.

The central issue in the matter at hand involves a question of fact, the

manner in which title was intended to be held. The factual determinations of the lower court were well supported by the facts and the law (as discussed in greater detail below) and, consequently, should be deemed binding. (See, In re Marriage of Jafeman (1972) 29 Cal.App.3d 244, and Beck v. Beck (1960) 242 Cal.App.2d 396.) The judgment should not be disturbed on appeal.

B. The Lower Court Judgment was Factually and Legally Correct.

In October of 1953, appellant purchased the subject real property. Appellant married Marjorie M. Pederson in 1960. The couple resided in the dwelling house continuously thereafter, and maintained it as their family residence. In 1964, the Pedersons jointly borrowed funds from Central Federal Savings & Loan for a room addition, which was secured by

a first deed of trust on the property. Concurrent with the above transaction, appellant conveyed the property to "Helmer Pederson and Marjorie M. Pederson, husband and wife, as joint tenants." The grant deed was prepared by a Central Federal bank representative.

At the time of the conveyance, neither of the Pedersons knew or understood the legal significance or difference between holding title as community property or as joint tenants. They received no explanation as to why the grant deed was prepared in the form of a joint tenancy. Throughout their marriage, the Pedersons maintained one checking account into which all of their community earnings were deposited and from which all payments on the Central Federal loan and other property expenses were disbursed.

Based on the above facts, the lower court found that the joint-tenancy presumption had been overcome and that the dwelling house was community property, subject in its entirety to an order for sale to satisfy the judgment against the judgment debtor. (See, Appendix "A" to appellant's jurisdictional statement.) The judgment debtor appealed from the order approving sale, contending that the dwelling house was his separate property and the separate property of his wife, rather than the community property of both, inasmuch as the grant deed stated on its face that they were "joint tenants." After hearing oral arguments, the Court of Appeals affirmed, stating:

> The district court's finding that the Pedersons intended their home to be held as community property was supported by substantial evidence in the record. The

home's sale was therefore proper. Cal. Code Civ. Proc. § 695.020(b) (West Supp. 1987).

The introduction to the jurisdictional statement filed by appellant is misleading. Appellant alleges that the district court characterized the residence as community property "apparently pursuant to California Civil Code . . . Section 4800.1." It is unclear how appellant arrived at that assumption. Neither the district court, nor the court of appeals referred to the aforementioned statutory provision. The dispute was resolved as a factual question of intent.

It is well settled that the form of the instrument under which a husband and wife hold title is not conclusive as to the character of the property. Frequently, property held under a joint-tenancy deed has been characterized as

community property in accordance with the intention, understanding, or agreement of the parties. (See, e.g., Socol v. King (1950) 36 Cal.2d 342 and Gudelj v. Gudelj (1953) 41 Cal.2d 202, 212.)

Hansford v. Lassar (1975) 53 Cal.App.3d 364, involved a factual background similar to that in the case at bar and is directly on point. The appellant misleads the court as to the breadth of the holding in Hansford. In Hansford, a third-party creditor of the husband sought to levy upon, and have an execution sale of, property which had previously been held in joint tenancy by a husband and wife. Immediately after the abstract of judgment had been recorded, the husband had apparently conveyed his interest to his wife to avoid levy against the property. The Court of Appeals set aside the fraudulent

interspousal conveyance, so that title reverted back to joint tenancy between the spouses, and then held that there was sufficient evidence to overcome the presumption that the husband and wife owned the residential property as joint tenants, in light of the evidence that they had conducted themselves throughout their marriage as if that property was community property. The circumstantial evidence considered by the court in Hansford in resolution of the factual issue of title included the exact same facts which exist in the case at bar.

California Code of Civil Procedure § 695.020, upon which the Court of Appeals relied, states, in pertinent part, that community property is subject to enforcement of a money judgment. Further, the community-property interest of the spouse of the judgment debtor is

fully liable for satisfaction of the money judgment. The above statutory provision is reinforced by California Civil Code § 5120.110, subparagraph a, which states as follows:

> Except as otherwise expressly provided by statute, the community property is liable for a debt incurred by either spouse before or during marriage, regardless which spouse has the management and control of the property and regardless whether one or both spouses are parties to the debt or to a judgment for the debt.

Both the factual determinations regarding the characterization of the real property interest and the subsequent order of sale were properly premised. As such, the lower court judgment should be affirmed or, in the alternative, the appeal should be dismissed.

CONCLUSION

The appeal is without proper jurisdictional basis. Further, the

federal issues are not substantial, are in fact nonexistent, and were not raised in the lower court proceedings. Therefore, they cannot be raised for the first time on appeal. The issues are strictly factual, and the lower courts' factual determinations were amply supported by the evidence. As such, further argument and review on appeal is inappropriate. The alleged federal issues are personal to the appellant, and there is no threatened violation of the federal rights of the public-at-large. The only public interest is that of the State of California of uniformity of its decisional law. The judgment of the Court of Appeals is in harmony with the applicable statutory provisions and case law. Reversal would create conflicts which did not heretofore exist.

The appeal is wholly without merit,

and is brought in bad faith to avoid payment of appellant's lawful obligations. In addition to his credit bid of almost a quarter of a million dollars, the appellant tendered cash in excess of $70,000.00 at the marshal's sale, from which appellant and his wife received $55,000.00 for their homestead exemption and Central Federal Savings & Loan received satisfaction in full of their First Deed of Trust. Appellant has not made any offer whatsoever to pay back appellee's substantial cash outlay, nor has he demonstrated any ability to do so or posted a supersedeas bond in lieu thereof. Furthermore, appellant never proferred any payment to appellee as compensation for occupancy of the premises during the ongoing, prolonged litigation. The appellant and his wife lived rent free for several years at the

expense of the appellee.

The appellee recently filed an unlawful detainer action in the San Diego County Superior Court. In his answer, the appellant referred to the within appeal to the United States Supreme Court as an affirmative defense thereto, even though stay of enforcement of the judgment was previously expressly denied.

During the unlawful detainer trial proceedings, appellant asserted that the federal court judgment was not binding on the pending state court proceedings and attempted to re-litigate the entire matter. The trial court found that the appellee obtained all rights, title and interest of both the appellant and his wife pursuant to the United States Marshal's Deed, and was the current legal owner of the subject property. Judgment was entered in favor of the appellee. A

writ of possession was then served by the Marshal on the appellant and his wife, who have since vacated the premises.

At the conclusion of trial, the court stated that it wished to make several observations. The court referred to the Full Faith & Credit Clause and the doctrines of res judicata and collateral estoppel, and indicated that the federal court findings should be enforced pursuant thereto. The court then stated that even if it had the authority to re-litigate the entire matter, it probably had sufficient evidence to overcome the joint-tenancy presumption created by the face of the deed and find, similar to the federal court, that the asset was community property. Finally, the court noted that the judgment creditor of the husband is entitled to reach the community asset in entirety.

Appellant already holds a judgment against appellee in excess of three-quarters of a million dollars which he undoubtedly will never be able to satisfy in full. Appellee did not even request damages for the fair rental value of the premises during the unlawful detainer action and waived all costs because any such award would be worthless. Appellant is obviously aware that he is virtually "judgment proof," inasmuch as any further award of damages would truly constitute an "empty judgment." Consequently, appellant continues to use the judicial system to thwart justice and perpetrate an inequity.

By the bad faith legal tactics being taken by the appellant and his counsel, the appellee has been forced to incur unnecessary legal fees and other expenses. Damages continue to mount for

which appellee will never be able to seek redress. Counsel for appellant was previously warned of the jurisdictional defects of the within appeal and cited to the appropriate authority. However, appellant and his attorney refused to voluntarily dismiss the appeal. As such, appellee respectfully requests sanctions against the attorney for the appellant for unmeritorious litigation and bad faith misuse of the judicial system.

Appellee respectfully contends that this honorable court should dismiss the appeal or affirm the lower court judgment, so as to rule in harmony with the Hansford v. Lassar case and in conformity with the applicable statutory provisions. Likewise, in consideration of the foregoing, any future petition for

certiorari should be expressly denied.

Respectfully submitted,

DATED:
10/12/87

STYN & GARLAND
Jeffrey N. Garland
Tawn H. Skousen

By Tawn H. Skousen
Tawn H. Skousen